

Agreement termed these particular reagents “PRODUCTS,” and specifically listed them all in its Exhibit B. *Id.* and Exhibit B thereto; Norviel Decl. ¶¶ 4, 10.

3. The Agreement defines “PRODUCT” as follows: “PRODUCT means an individual reagent, component or combination thereof including kits for use in nucleic acid labeling and detection, the manufacture, use or sale of which is covered by one or more claims of ENZO PATENTS (EXHIBIT A), the PRODUCTS being listed in EXHIBIT B.” Agmt., p. 2.

4. Enzo and Affymetrix could have agreed to add further products to Exhibit B of the Agreement, thus making such products “PRODUCTS” under the Agreement. Agmt. Ex. B, p. 1; Norviel Decl. ¶¶ 4, 10. But Enzo and Affymetrix never agreed to add further products to the Agreement’s Exhibit B. Declaration of Lisa A. Cowell, dated December 20, 2006 (“Cowell Decl.”) ¶ 2.

5. In addition to distribution rights, the Agreement gave Affymetrix certain rights to use Enzo’s reagent PRODUCTS in, *inter alia*, its product development work. Agmt. § 5. In turn, Enzo was granted back certain rights to improvements and inventions that Affymetrix might make regarding these particular reagents while using them. *Id.*

6. The rights noted in Paragraph 5 above are addressed in the following provisions of Section 5 of the Agreement:

ENZO agrees to permit AFFYMETRIX to use PRODUCTS and ENZO’s confidential information (“C.I.”) as defined in Section 14 below only for the following purposes and AFFYMETRIX agrees that its use of same shall be limited to:

- (a) performing quality control procedures for the PRODUCTS,
- (b) optimizing the function of GeneChip® products and GeneChip® Assays; and
- (c) developing new gene chip products.

If any invention or product is conceived during the course of AFFYMETRIX' use of the PRODUCTS and/or ENZO's C.I. and is directed to the PRODUCTS, or their use, or improvements thereto, AFFYMETRIX will have the rights to such inventions and products for novel gene chip products, and ENZO will retain all other rights to such inventions and products including but not limited to those for labeling and detection processes and components therefor.

7. The Affymetrix package insert to which Enzo agreed stated that "Enzo's products" were for "research use only." Cowell Decl. ¶ 3.

8. A Roche-created label is used with the AmpliChip CYP450 arrays. Neither an Affymetrix label nor an Enzo label is so used. Declaration of Stephen Will, dated December 20, 2006 ("Will Decl.") ¶ 6.

9. One Enzo labeling reaction could be – and was – used by Affymetrix customers to generate labeled samples sufficient for application to multiple GeneChips, not just one. Cowell Decl. ¶ 4.

10. Affymetrix's customers could – and did – buy the Enzo kits from Enzo, or from Enzo's other distributors. Cowell Decl. ¶ 5.

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Respectfully submitted,

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